No. 92-741

In the Supreme Court of the United States

OCTOBER TERM, 1993

FEDERAL DEPOSIT INSURANCE CORPORATION,
PETITIONER

v.

JOHN H. MEYER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

TABLE OF AUTHORITIES

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1. It is undisputed that, if the sue-and-be-sued clause in the charter of the Federal Savings and Loan Insurance Corporation (FSLIC) did not waive sovereign immunity, this case cannot proceed. In our opening brief (Gov't Br. 11-23), we explain that the sue-and-be-sued clause in FSLIC's charter could not be construed to waive sovereign immunity for purposes of this case because such an interpretation is barred by 28 U.S.C. 2679(a). That provision states that a sue-and-be-sued clause does not waive sovereign immunity for claims—such as respondent's claims in this case—that are "cognizable" under the Federal Tort Claims Act (FTCA).

a. Respondent contends (Br. 30-33) that his claim avoids the bar of Section 2679(a) because it is not "cognizable" under the FTCA. His bases for that contention are unsound. It is true, as respondent states (Br. 31), that this Court has described common law torts and *Bivens* actions as "parallel" and "complementary," and has stated that Congress did not intend the FTCA "to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Carlson* v. *Green*, 446 U.S. 14, 19, 20 (1980). But that is because Congress recognized that *Bivens* remedies are available only against federal officials in their personal capacities. Respondent therefore merely states an obvious premise of this case—that the FTCA did not create a "remedy" for constitutional violations. As we explain in our opening brief (Gov't Br. 15-16 & n.13), however, the fact that the FTCA precludes recovery for a particular type of claim in no way suggests that tort claims generally (including constitutional tort claims) are not "cognizable" under the FTCA. See, *e.g.*, *United States* v. *Smith*, 111 S. Ct. 1180, 1185 (1991). The FTCA takes cognizance of the entire category of tort claims against the United States and specifies those for which a monetary remedy will be afforded. The purpose of Section 2679(a) is to ensure that the FTCA's requirements apply to all government agencies and instrumentalities, regardless of whether they are subject to a sue-and-be-sued clause.

Nor does the legislative history of the Federal Employees Liability Reform and Tort Compensation Act of 1988 cast any doubt on the conclusion that constitutional torts are "cognizable" under the FTCA. The legislative history of the 1988 Act, which did not amend Section 2679(a), cannot provide an authoritative interpretation of a term that Congress used when it enacted the FTCA 40 years earlier. See *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990). And in any event, the portions of the legislative history quoted by respondent (Br. 31-32)—which even he concedes are "not entirely enlightening" (Br. 31)—simply make the same point made by this Court in *Carlson*. As the passage quoted by respondent explains, the FTCA does not permit recovery on constitutional tort claims, and "[p]ersons alleging constitutional torts * * * remain free to pursue a remedy *against the individual employee* if they so choose." Br. 32 n.10 (quoting *Legislation to Amend the Federal Tort Claims Act: Hearing on H.R. 4358, H.R. 3872, and H.R. 3083 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 78 (1988) (emphasis added)). Nothing in the materials quoted by respondent remotely suggests that constitutional tort claims fall outside the bar in Section 2679(a) and may be brought directly against a federal agency for recovery of a money judgment. To the contrary, as we explain in our opening brief (Gov't Br. 22-23), the changes in Section 2679(b) actually made by the 1988 Act presuppose that constitutional tort claims *are* "cognizable" under the FTCA.

b. It does not advance respondent's cause simply to assert (Br. 33) that constitutional torts are distinct in some respects from common law torts. The sole basis on which the court of appeals held that constitutional tort claims are not "cognizable" under the FTCA was that they are excluded by the FTCA's basic waiver of sovereign immunity, 28 U.S.C. 1346(b), rather than by one of the FTCA's "express" exclusions. We explain in our opening brief (Gov't Br. 19-20) that Section 1346(b) excludes many other types of tort claims as well, including those based on strict liability, those based on actions by a federal employee outside the scope of his

employment, and those nonconstitutional tort claims in which a private person would not be liable under state law. Under the theory advanced by the court of appeals and by respondent, all of those claims would similarly be held not "cognizable" under the FTCA, and all of them could thus be brought directly against a sue-and-be-sued agency.[1] That would be inconsistent with Congress's determination that Section 2679(a) would "place torts of 'suable' agencies * * * upon precisely the same footing as torts of 'nonsuable' agencies," and it would lead to precisely the result that Congress sought to avoid, by making a sue-and-be-sued clause "the basis for suits for money recovery sounding in tort." H.R. Rep. No. 1287, 79th Cong., 1st Sess. 6 (1945).

There is, in short, no principled basis for creating a loophole in Section 2679(a) just large enough for constitutional torts. Rather, if the reasoning of the court of appeals and of respondent is correct, a wide gap in FTCA "cognizability" is created for numerous varieties of constitutional and nonconstitutional torts. Sue-and-be-sued agencies—but not other agencies—could be sued for all of those torts, in direct contravention of the language and purposes of Section 2679(a). Respondent entirely

[1] Aside from the FTCA's "explicit" exceptions in 28 U.S.C. 2680 and its "implicit" exceptions in 28 U.S.C. 1346(b), FTCA plaintiffs may not recover on tort claims if they do not satisfy the FTCA's procedural requirements. See, *e.g.*, *McNeil* v. *United States*, 113 S. Ct. 1980, 1983 (1993). Under the approach advanced by respondent and the court of appeals, it is unclear whether cases like *McNeil*—where recovery was denied on the ground that the plaintiff failed to submit a timely administrative claim as required by the FTCA—could nonetheless be brought as ordinary tort claims directly against a sue-and-be-sued agency. In our view, however, the answer to that question is simple. If a claim is for a tort, it is "cognizable" under the FTCA and cannot be brought against a sue-and-be-sued agency outside the FTCA.

disregards the broad and untoward effects of the court of appeals' holding.

2. We explain in our opening brief (Gov't Br. 23-24) that respondent's claim is also defective because a suit against the government must be based not merely on a waiver of sovereign immunity, but also a source of law that "can fairly be interpreted as mandating compensation by the Federal Government." *United States* v. *Testan*, 424 U.S. 392, 402 (1976); see also *United States* v. *Hopkins*, 427 U.S. 123, 130 (1976) (per curiam); *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983). The provision on which respondent relies—the Due Process Clause—does not satisfy that criterion.

Respondent argues that *Bivens* establishes that the Due Process Clause is "a natural predicate for money damages." Br. 33; see also Br. 27. *Bivens* involved a suit against a federal official (not the federal government) for a claimed violation of the Fourth Amendment (not the Due Process Clause). By permitting that action to proceed, the Court did not have the occasion to address, much less decide, whether the Due Process Clause mandates compensation against the government. The issue was squarely presented, however, in *Hopkins*, a specific holding of which was that a claim of deprivation of a property right under the Due Process Clause had to be dismissed because the Clause could not be read to mandate compensation against the government. Although, as respondent points out, *Hopkins* was a brief per curiam decision, the case squarely stands for the point we argue here, and it has never been disapproved or overruled. See also *Schillinger* v. *United States*, 155 U.S. 163, 168 (1894).

Respondent also argues (Br. 34-35) that a contrary result is required by *Mitchell*. If respondent were correct, *Mitchell* must have *sub silentio* limited or overruled *Testan* and *Hopkins*. *Mitchell*, however, did

neither. The source of law mandating compensation by the federal government in *Mitchell* was the common law of fiduciary relationships. 463 U.S. at 225. As the Court explained, breach of trust, like breach of contract or negligence, is a traditional common law cause of action redressable—in many cases exclusively redressable—by money damages. *Id.* at 226. The Court therefore found that "it naturally follows" that such common law causes of action mandate money damages against any entity against which suit can be brought. *Ibid.* Indeed, a waiver of sovereign immunity from such causes of action would make little or no sense absent the ability of a plaintiff to obtain money damages.[2] *Mitchell* stands for that unremarkable proposition.

The situation is entirely different, however, with sources of law—such as the Due Process Clause—that impose duties that are ordinarily redressable by relief other than money damages. In such cases, it is reasonable to assume not that a waiver of sovereign immunity extends to money damages, but rather that in the absence of an express right to money damages against the government, a plaintiff must pursue other forms of relief. The Due Process Clause, unlike the Just Compensation Clause, contains no such express right to monetary compensation. As relevant here, it provides that "[n]o person shall be deprived of * * * property, without due process of law." The only remedy the Clause necessarily suggests is a right to restoration of the property in question if a person has been deprived of it without the requisite process—just as a right to restoration of freedom (through habeas corpus or otherwise) is the ordinary remedy if a person is deprived of liberty without due process. In neither case is monetary compensation mandated or even suggested.

[2] It has been held that the primary purpose of FSLIC's sue-and-be-sued clause was to permit such common law contract actions to be brought by individuals against FSLIC to obtain deposit insurance payments. See, *e.g.*, *Abbott Building Corp.* v. *FSLIC*, 739 F. Supp. 532, 534 (D. Nev. 1990), aff'd, 951 F.2d 191 (9th Cir. 1991); *Jugum* v. *FSLIC*, 637 F. Supp. 1045, 1047 (W.D. Wash. 1986).

This conclusion also follows in the context of this case from the settled principle that waivers of sovereign immunity must be narrowly construed. It is supported as well by the principle that payment of funds under the Appropriations Clause may only be made on the basis of "express terms" that establish a "substantive right to compensation." *OPM* v. *Richmond*, 496 U.S. 414, 432 (1990); see p. 8, *infra*. *Hopkins* was based on those principles, is entirely consistent with *Mitchell*, and squarely governs this case.

3. Respondent also disputes (Br. 16-25) our contention that there are a number of special factors counselling hesitation that would make implication of a *Bivens* right of action in this context inappropriate.

a. The most significant "special factor counselling hesitation" in this case is also the most obvious—the fact that this suit was brought directly against a federal agency and could thus result in a judgment for damages directly against a federal agency or instrumentality. That fact was recognized as a special factor counselling hesitation in *Bivens* itself. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971). Respondent's effort to eliminate that factor could only result in weakening one of the fundamental limitations on this Court's holding in *Bivens* that permitted implication of private rights of action against federal employees for violation of the Constitution.

We have already responded (Gov't Br. 25-26) to respondent's argument (Br. 16) that the effect on the federal fisc is insignificant because it is no greater than the effect on the federal fisc of a *Bivens* action against a

federal employee who is then indemnified by the government. There is a substantial—and, in this case, dispositive—legal difference between a government expenditure pursuant to an authorized indemnification policy and a court order that the government shall pay a judgment on a claim for which government indemnification has never been authorized.

Respondent also argues that *OPM* v. *Richmond*, 496 U.S. 414 (1990), does not support our argument because "there was no consensus, among the Justices writing opinions in [*Richmond*], for the proposition that the Appropriations Clause would bar the Court from ordering payments from a federal agency where payment is required to remedy a violation of the Due Process Clause." Br. 17. The opinion of the Court in *Richmond*, however, stated in plain terms that "funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute." 496 U.S. at 432.[3] That reasoning would also appear to permit funds to be paid out pursuant to constitutional provisions, such as the Just Compensation Clause of the Fifth Amendment, that expressly provide a right to compensation, where Congress has enacted the requisite waiver of sovereign immunity. See 28 U.S.C. 1491 (Tucker Act). But the Court's rationale in *Richmond* would preclude payment of government funds to remedy violations of other constitutional provisions,

[3] Respondent cites (Br. 17) Justice White's concurring opinion in *Richmond* in support of his position. That opinion addresses the question whether Congress may use its appropriations power to control the exercise of powers granted to other branches. 496 U.S. at 435. This case involves no such question, and nothing in Justice White's opinion suggests any disagreement with the Court concerning the limitations on appropriations of government funds in cases such as this.

such as the Due Process Clause, that do not expressly provide rights to compensation.

Respondent also asserts (Br. 18-19) that *Richmond* is inapplicable because Congress has appropriated funds for FSLIC and any judgment would come out of those appropriated funds. That argument essentially mirrors the rationale of Justice Stevens' opinion concurring in the judgment in *Richmond*, see 496 U.S. at 435—an opinion that rejected the rationale of the Court and in which no other Member of the Court joined. Moreover, the statute cited by respondent (Br. 18) provides no support for his contention that Congress appropriated money for FSLIC to pay judgments in cases like this. The statute, which generally governs appropriations for wholly owned government corporations, provides that Congress "shall * * * make necessary appropriations *authorized by law* [and] * * * make corporate financial resources available *for operating and administrative expenses*." 31 U.S.C. 9104(a)(2) and (3) (emphasis added). That provision does not suggest that the resulting appropriations may be used for payments that have *not* been authorized by law. In that respect, it is precisely parallel to the provision establishing the judgment fund, 31 U.S.C. 1304, which, as we explain in our opening brief (Gov't Br. 26 n.20), creates no "substantive right to compensation." *Richmond*, 496 U.S. at 432.

b. We argue in our opening brief (Gov't Br. 26-28) that a second factor counselling hesitation is Congress's recognition, embodied in the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), that policy decisions of federal officials, such as the decision to terminate respondent's employment, ought not be subject to judicial review via the medium of a tort suit. See *United States* v. *Gaubert*, 111 S. Ct. 1267, 1273 (1991).

Respondent claims (Br. 22-23) that permitting a *Bivens* action in the context of this case would not be

inconsistent with the discretionary function exception. Indeed, in his view (Br. 22), the discretionary function exception is irrelevant to this case, since this is a *Bivens* action and is not subject to the FTCA. Our argument is not, however, that the discretionary function exception directly applies to this case. It is rather that this Court, in determining whether it is appropriate to imply a *Bivens* action in a particular context, ought to give substantial weight to Congress's judgments about the proper means to obtain judicial review of the actions of a government agency. The discretionary function exception embodies Congress's judgment that a tort suit against the government for damages is not an appropriate means for obtaining such judicial review. It would therefore be inappropriate to imply a *Bivens* action in such circumstances.[4]

c. Finally, respondent disputes (Br. 23-25) our argument that implication of a *Bivens* remedy would be inappropriate because of the existence of alternative remedial mechanisms. We focused (Gov't Br. 28-29) on the existence of two such mechanisms in particular: the FTCA and the receivership claims process.

Respondent argues that the existence of both of those elaborate remedial schemes is irrelevant, because Congress has not "fashioned an alternative remedy explicitly declared to be a substitute for recovery under the Constitution and viewed as being equally effective." Br.

[4] The statutory policy embodied in 28 U.S.C. 2679(a)—even if the Court should conclude that the text of that Section does not by its terms foreclose this suit (but see pp. 1-4, *supra*)—also counsels hesitation against judicial "implication" of a cause of action against the government in the absence of affirmative approval by Congress. The thrust of Section 2679(a), enacted long before *Bivens*, was to put sue-and-be-sued agencies and instrumentalities on an equal footing with all other agencies and instrumentalities with respect to tort claims. See p. 4, *supra*.

23. If that were the test, however, this Court's decisions in *Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988), would be inexplicable. As we point out in our opening brief (Br. 28), in both of those cases, this Court declined to imply a *Bivens* action because of the existence of alternative remedial mechanisms. In neither case had Congress "explicitly" declared its remedy "to be a substitute for recovery under the Constitution" and in neither case was the remedy "equally effective," at least in the view of the plaintiff in the *Bivens* action. See *Chilicky*, 487 U.S. at 425; *Bush*, 462 U.S. at 388. In both *Bush* and *Chilicky*, as in this case, elaborate mechanisms were available whereby those suffering injuries of the sort that the *Bivens* plaintiff claimed could obtain redress. In both *Bush* and *Chilicky*, the "design" of the government program "suggests that Congress has provided what it considers adequate remedial mechanisms." *Chilicky*, 487 U.S. at 423. The same is true here.

4. As we explain in our opening brief (Gov't Br. 29-36), even if this suit for money damages is not barred, respondent has failed to state a claim for violation of the Due Process Clause, because he was not deprived of any property interest. Although state law provided him with a right to continued employment with Fidelity absent good cause, state law could not have given him an expectation of continued employment once a federal receiver had taken over Fidelity. Federal law granting FSLIC as receiver broad powers over an institution in receivership, including powers to employ such personnel as appropriate and to repudiate contracts, governs the contractual relationships of the receiver, and it prevails over any state law that would limit those federally granted powers.

Respondent's primary argument (Br. 35-41) is that his state-created right to continued employment extended

even to the situation in which a federal receiver was appointed to dispose of or liquidate Fidelity.[5] At the time respondent's employment was terminated, a federal regulation provided that FSLIC as receiver could "[r]eject or repudiate any lease or contract which it considers burdensome." 12 C.F.R. 569a.6(c)(3) (1982). In respondent's view (Br. 36-40), that regulation imposed an obligation on the federal receiver that was equivalent to the obligation imposed on Fidelity under state law to continue respondent's employment.

The regulation on which respondent relies gave extremely broad discretion to FSLIC as receiver to repudiate contracts. That authority mirrored the authority that receivers had at common law. See cases cited at Gov't Br. 31 n.24. See also *United States Trust Co.* v. *Wabash Western Ry.*, 150 U.S. 287, 299 (1893) (receiver not bound to adopt contracts "if in his opinion it would be

[5] Respondent argues (Br. 37-38) that, before Fidelity was put into receivership, his right to continued employment under state law was not an "unsafe or unsound" practice under 12 C.F.R. 563.39. We have not argued, however, that his right to continued employment was generally invalid prior to receivership, but only that state law could not, and did not, give him a legitimate expectation of continued employment in the event Fidelity was placed in federal receivership. Similarly, respondent's amicus alleges that our analysis "ignore[s]" 12 C.F.R. 563.39. Nat'l Employment Lawyers' Ass'n Amicus Br. 16. That view is apparently based on amicus's premise that an employment contract that is not an "unsafe or unsound" practice under 12 C.F.R. 563.39 is entitled to enforcement, even when the employer thrift fails and is taken over by a federal receiver. See Amicus Br. 11. Nothing in 12 C.F.R. 563.39, however, suggests that it was intended to address the authority of a receiver in any way. Moreover, the primary function of a receiver is not to operate the failed institution and avoid committing "unsafe or unsound" practices. Rather, the receiver's task is to liquidate or dispose of the institution as quickly as possible, at the least expense to the institution's creditors, including the federal insurance fund.

unprofitable or undesirable to do so"). In the analogous bankruptcy context, this Court has noted that the "traditional" and generally applicable test for repudiation of contracts is the highly deferential business judgment rule. See *NLRB* v. *Bildisco & Bildisco*, 465 U.S. 513, 523 (1984). Under that rule, a bankrupt's decision to repudiate an executory contract must be accepted "unless it is shown that the * * * decision was one taken in bad faith or in gross abuse of the bankrupt's retained business discretion." *Lubrizol Enterprises, Inc.* v. *Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046-1047 (4th Cir. 1985), cert. denied, 475 U.S. 1057 (1986). Since 1941, when the first regulations governing federal banking receivers were promulgated, they have used language identical to that in the regulation at issue here to give receivers the same broad powers to repudiate contracts. See 6 Fed. Reg. 4414 (1941) (promulgating 24 C.F.R. 204.10(*l*) (1941)).[6]

The breadth of the receiver's discretion in determining whether to repudiate a contract is apparent from the face of the regulation, which provided that FSLIC had the power to repudiate contracts "it considers" burdensome. In *Webster* v. *Doe*, 486 U.S. 592, 600 (1988), the Court construed an equivalent provision permitting the dismissal of a CIA employee when the Director of the CIA "shall *deem* such termination necessary or advisable in the interests of the United States." The Court noted that the standard "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review." *Ibid.* Here, the regulation both entrusts the "burdensomeness" determination to the receiver and provides no standards by

[6] The regulation was later recodified at 12 C.F.R. 549.3(a) (1989) (repealed in 1989); see also 12 U.S.C. 1821(e)(1) (Supp. IV (1992) (current statutory right of FDIC to repudiate contracts).

which the receiver's determination on that point could be judged.[7] Cf. *Lincoln* v. *Vigil*, 113 S. Ct. 2024, 2032 (1993).

Moreover, although federal regulations had long given FSLIC as receiver authority to repudiate contracts, the specific regulation at issue in this case was promulgated in response to Congress's enactment of the Bank Protection Act of 1968, Pub. L. No. 90-389, § 6, 82 Stat. 295-296 (codified at 12 U.S.C. 1729(c)(2) and (3)). See 33 Fed. Reg. 11,844 (1968) (notice of proposed regulations); 33 Fed. Reg. 14,366 (1968) (promulgating regulations). That statute gave federal regulators authority for the first time to require that FSLIC be appointed as receiver for failed federally insured state-chartered institutions. As we noted in our opening brief (Gov't Br. 30), the 1968 Act gave extremely broad powers to FSLIC as receiver to liquidate or dispose of the institution. Far from subjecting FSLIC's actions as receiver to conditions imposed by state law, Congress intended that "[t]he authority of the FSLIC * * * would be subject only to the regulation of the Federal Home Loan Bank Board and not to that of any State authority, administrative or judicial, which may previously have had regulatory authority with respect to the institution." S. Rep. No. 1263, 90th Cong., 2d Sess. 10 (1968). To underscore the point, Congress prohibited judicial review by providing that no court may "restrain or affect the exercise of

[7] Respondent asserts (Br. 39 n.13) that recognition that federal receivers have broad discretion to repudiate contracts would "allow decisions based on race, age or gender." That is mistaken. We have established that the federal banking regulatory scheme grants FSLIC as receiver broad and unreviewable discretion to repudiate contracts. The fact that the federal banking regulatory scheme imposes no justiciable limits on the receiver's power to repudiate contracts, however, does not imply that it is immune from applicable constitutional norms.

powers or functions of a * * * receiver." 12 U.S.C. 1464(d)(6)(C).

In determining whether respondent had a property interest in continued employment by the receiver, the key question is whether respondent had a legitimate expectation of such employment. In light of the extremely broad discretion granted FSLIC as receiver to repudiate contracts, the answer to that question must be "no." The applicable regulations, as well as the entire legal framework governing federal receiverships, can only be construed to inform those who contract with financial institutions that they should have *no* expectation of continued performance of their contracts if the institution fails and a federal receiver is appointed.[8] The receiver's broad powers preclude the possibility that the receiver's ability to repudiate employment contracts was limited in the same way that a California employer would be in discharging an employee.

5. a. We argue in our opening brief (Gov't Br. 37-44) that, even if respondent retained a property interest in continued employment by the federal receiver, he also had adequate postdeprivation remedies that provided him with all the process that was due. Respondent claims

[8] Indeed, it would appear that the fundamental premise of respondent's argument is the perverse claim that 12 C.F.R. 569a.6(c)(3) (1982)—which was intended to give the federal receiver a broad right to repudiate contracts—gave respondent a protected property interest in continued employment. That premise is explicit in respondent's argument (Br. 40 n.14) that the issue at a hearing would be "whether [respondent's] implied employment contract was 'burdensome'"—*i.e.*, whether the receiver's action comported with the *federal* regulation. That premise, however, is inconsistent not only with the plain language and intent of the federal regulation, but also with the position that respondent has taken throughout this litigation that his property interest derived solely from state law.

(Br. 43) that a postdeprivation remedy is never adequate where termination of employment is at stake.

Even in employment cases, this Court has never adopted a rigid rule requiring a predeprivation hearing. In *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542-545 (1985), the Court did find that a predeprivation hearing was necessary. But, as we explain in our opening brief (Gov't Br. 40), the factors on which the Court based its decision in *Loudermill* are not applicable here. Moreover, in *FDIC* v. *Mallen*, 486 U.S. 230, 241 (1988), the Court held in a closely related context that a bank officer may be suspended without a predeprivation hearing. And in *Barry* v. *Barchi*, 443 U.S. 55, 65 (1979), the Court concluded that a horse trainer's license may be suspended—an action that would necessarily lead to loss of employment for the trainer—without a predeprivation hearing. There is no absolute rule requiring a predeprivation hearing when the property right at issue involves loss of employment.

More fundamentally, the Due Process Clause does not rigidly distinguish between employment and other cases. Regardless of the precise nature of the property interest at stake, exigent circumstances coupled with an adequate postdeprivation remedy can satisfy the demands of due process. This Court has applied that principle in a number of areas. Respondent offers no reason why it should be held inapplicable here.

b. Respondent asserts that the postdeprivation claims process was "illusory" (Br. 45) and therefore a predicate for the application of the doctrine of *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), is absent. In his view (Br. 45), the process for submission of claims is available only for claims based on wrongful conduct prior to the receivership.

Respondent is mistaken as to the scope of the claims process established by FSLIC regulations and discussed

by this Court in *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561 (1989).[9] That process was available to any party with a claim against the estate. Respondent cites nothing in the regulations or in this Court's decision in *Coit* that limited the process to claims arising from "preseizure wrongful conduct" or, indeed, to claims arising from "wrongful" conduct of any kind. Nor is there any reason in law or logic why the claims process would have been so limited. Rather, the process was available to satisfy all claims against the estate of the failed institution. It was available regardless of whether the claim accrued prior to the seizure of the institution or as a result of the repudiation of a contract by the receiver, and regardless of whether it arose as the result of "wrongful" conduct or as a result of the receiver's appropriate exercise of the power to repudiate an executory contract.

Respondent also speculates (Br. 45-46) that the claims process would have afforded an inadequate remedy because, had he submitted a claim, the receiver would have denied it on the ground that he had no contractual right that was violated. Even if respondent's speculation were correct, however, it would have no bearing on the analysis. The adequacy of the postdeprivation remedy does not turn on whether respondent would have recovered on his claim; insofar as his claim was invalid, it is to be expected that a fair and adequate postdeprivation remedy would result in a denial of payment. The relevant point for present purposes is that if a fair procedure was avail-

[9] The claims process that was in effect at the time of *Coit* differed from that which was employed in the early 1980s, when this case arose. See *Coit*, 489 U.S. at 580-582. Those differences, however, suggest that the claims process at the time of this case provided a more effective remedy than the process in effect at the time of *Coit*. They are thus of little relevance to the decision in this case.

able, it would provide him with all the process that was due on his claim for breach of contract, and would thereby vitiate his claim that he was deprived of property without due process of law.

In a footnote, respondent states (Br. 46 n.16) that his contractual claim against the estate could only be satisfied out of assets of the estate and that no such assets were likely to have been available to satisfy his claim. That possibility, however, would not advance respondent's argument. First, the possibility that respondent's claim—like that of any other creditor—might not have been paid in full does not affect the due process analysis. It no more gives him a right under the Due Process Clause than it would give such a right to any other creditor who receives less than full payment on a claim because the estate's funds are inadequate. Any other result would generally call into question the constitutionality of bankruptcy and insolvency laws. Second, respondent did not submit a claim, and it was nowhere determined that, had he submitted a valid claim, there would have been no funds available from which to pay it. In fact, contrary to respondent's assertion (Br. 46 n.16), the record in this case demonstrates that funds were available to satisfy any valid claim respondent would have submitted. It was stipulated by the parties that Fidelity's assets were transferred to Fidelity Savings and thence to Citicorp, but that "[b]y virtue of the various transactions occurring after the seizure, the FSLIC assumed and undertook to pay and discharge valid liabilities, if any, arising out of [respondent's] employment with or termination from" Fidelity. J.A. 75. Accordingly, this case presents no question concerning the application of the successorship doctrine or the legal consequences of a receiver's transfer of assets from a failed banking institution without such a provision for payment of the institution's liabilities.

In short, respondent had the opportunity to submit his contract claim either to the receiver, with subsequent *de novo* determination by a federal district court if he so desired, or directly to a federal district court. Either route would have provided him with a fair opportunity to establish that he had a contractual right that was breached. Moreover, the remedy for a breach of his contract by Fidelity prior to receivership would have simply been an action for contract damages. See Gov't Br. 43. There is no reason why that same remedy should be regarded as inadequate for the same breach of contract that allegedly occurred after FSLIC succeeded to Fidelity's contractual obligations. Under *Parratt* and *Hudson*, the claims process, including the right to bring suit in federal court, provided him with all the process that was due.

Respondent finally asserts (Br. 46) that our argument ignores the fact that his claim in this case is for violation of the Due Process Clause, not for breach of contract. But it is respondent who misses the point. Respondent alleges that he was deprived of a contractual right to continued employment and that he received inadequate process before that deprivation occurred. *Parratt* and *Hudson* establish that the ordinary processes of tort law may provide all of the process that is due to someone who alleges that he was deprived of a property interest as a result of state action. See also *Ingraham* v. *Wright*, 430 U.S. 651, 676-680 (1977) (liberty interest). The claims process—including the opportunity to bring an ordinary contract claim in federal court—similarly provided all the process that was due to respondent. Although the claims process did not provide a *remedy* for his alleged violation of due process, the existence and adequacy of that process established, as in *Parratt*, *Hudson*, and *Ingraham*, that there was no due process violation. As we explain in our opening brief (Gov't Br. 43

n.33), any other result would convert any governmental breach of contract not preceded by a hearing—including any repudiation of a contract by a federal banking receiver—into a violation of the Due Process Clause.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JULY 1993